HWANG-DBS SECURITIES BHD

v.

HARUN JASIN

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-304-2002]
13 OCTOBER 2003

SECURITIES: *Shares - Trading losses and interest - Appeal against stockbroker's claim allowed for trading losses and interest - Whether losses could be recovered by selling shares pledged as security - Whether stockbroker under a duty to mitigate losses - Whether interest could be recovered due to negligence of remisier*

The plaintiff, a firm of stockbrokers, was engaged by the defendant to trade in shares. As a result of trading, a sum of RM160,693.31 was due and owing to the plaintiff by the defendant. Upon demand by the plaintiff, the defendant signed a security transfer request form pledging his 25,000 shares in one Denko Industrial Corporation Berhad ('Denko') to the account of a remisier working for the plaintiff and who handled the defendant's account. The plaintiff, however, commenced an action in the lower court against the defendant for a sum of RM217,209.48 which consisted, *inter alia*, of trading losses in the sum of RM160,693.31 and interest in the sum of RM51,463.28. The plaintiff succeeded in the action. Hence, the defendant's appeal. The defendant admitted owing the sum of RM160,693.31 but not the interest of RM51,463.28. The defendant argued that once he had pledged his 25,000 shares in Denko, it was the duty of the plaintiff to have sold the shares on the material day to recover the plaintiff's losses. In fact, the sale of the shares at the material date would have more than covered the losses. The defendant also submitted that the said shares had not been sold to date.

Held:

[1] There was no plausible reason given by the plaintiff as to why it did not sell the shares pledged. The shares pledged as security were readily available and yet the plaintiff did not avail itself of the best opportunity of recovering its losses. If the total worth of the pledged shares were not sufficient to satisfy the debt due to the plaintiff, there was an arguable case for the plaintiff to have held on to the shares in the event the price went up. But the total price of the shares when sold would be more than

sufficient to cover the losses. There was a duty upon the plaintiff to have mitigated the losses the defendant had to bear. Since time was an essential factor for consideration, it was incumbent upon the plaintiff to have protected its own interest and at the same time ensure that the interest of its client was also protected by disposing of the shares when it was at its highest. The plaintiff failed to protect both the interests. (p 332 d-g)

[2] The remisier into whose account the defendant's pledged shares were put was its employee. Yet there was no explanation as to why the shares were not held by the plaintiff. In any case, whether the pledged shares were in the account of the plaintiff or the remisier made no difference to the defendant's case because the plaintiff ought to have instructed its remisier to sell the pledged shares. If as submitted by the plaintiff, the shares were to be treated as belonging to the remisier and not to the defendant, then it was surprising that the plaintiff had initiated this action. Obviously the remisier was negligent in failing to dispose of the shares quickly. It was therefore totally inappropriate for the plaintiff to attempt to recover the interest from the defendant due to the negligence of its own employee. (pp 332 h-i & 333 a-b)

[Defendant's appeal allowed; judgment of lower court set aside in respect only of interest sum.]

For the appellant/plaintiff - Cheah Ee Keong; M/s Peter Huang & Richard
For the respondent/defendant - Latsmanan Ponnusamy; M/s Khor Gaik Thiam & Latsmanan

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff/appellant is a stock-broking firm trading in shares and is a member of the Kuala Lumpur Stock Exchange. The defendant/respondent employed the plaintiff to trade in shares.

As a result of trading and due to centra-losses, the plaintiff sued the defendant for a sum of RM217,209.48 made up as follows:

(a)	Trading losses	RM160,693.31
(b)	Interest	RM 51,463.28

The defendant began trading with the plaintiff on 9 April 1996 and as of 22 April 1997 a sum of RM160,693.31 was due and owing to the plaintiff. On the same day, and upon demand by the plaintiff, the defendant signed the Security Transfer Request form, pledging his 25,000 shares in Denko Industrial Corporation Berhad (Denko) to the account of one Abdul Rahman bin Abdullah, the remisier working for the plaintiff, and who was also handling the defendant's account. A Denko share, on the same date, was RM11 at its highest, and RM10.30 at its lowest.

Findings Of The Court

It is the defendant/respondent's case (as confirmed at trial) that whilst he admits owing a sum of RM160,693.31, he is not liable for the interest amounting to RM51,463.28. The defendant argued that once he had pledged his 25,000 shares in Denko, it was the duty of the plaintiff to have sold the shares on the same day to recover the plaintiff's losses forthwith. In fact it was pointed out by the defendant that had the 25,000 shares in Denko been sold on that date, the plaintiff would have obtained RM275,000 which more than covered its losses. In fact the defendant pointed out that the said shares have not been sold to date.

There is no plausible reason given by the plaintiff as to why it did not sell the shares pledged. This is not a case of the defendant having bought shares and not being able to pay for it, whereby the plaintiff would be obliged to force-sell the shares after the due date for payment. In this case the plaintiff had the shares pledged as security readily available and yet the plaintiff did not avail itself of the best opportunity of recovering its losses.

If for instance the total worth of the pledged shares would not have been sufficient to satisfy the debt due to the plaintiff, there is an arguable case for the plaintiff to have held on to the shares in the event the price went up. But in this case the total price of the shares when sold would have been more than sufficient to recover the losses. There was a duty upon the plaintiff to have mitigated the loss the defendant had to bear. Since time is an essential factor for consideration, it was incumbent upon the plaintiff to have protected its own interest and at the same time ensuring that the interest of its client is also protected by disposing of the shares when it was at its highest. In this case the plaintiff failed to protect both the interests.

There is another factor to be considered. The plaintiff has confirmed that the remisier, into whose account the defendant's pledged shares were put, was its employee. Yet there was no explanation why the shares were not held by the plaintiff. In any case whether the pledged shares were in the account of the plaintiff or the remisier, makes no difference to the defendant's case because

the plaintiff ought to have instructed its remisier to sell the pledged shares. However the Senior General Manager of the plaintiff testified that so far as the plaintiff was concerned the pledged shares were treated as belonging to the remisier and not to the defendant. Considering such an admission it is surprising that the plaintiff even initiated this action. The defendant's shares were put into the account of the remisier and the plaintiff treated those pledged shares as belonging to the remisier. Obviously the remisier was negligent in failing to dispose of the shares quickly. It is therefore totally inappropriate for the plaintiff to attempt to recover the interest from the defendant, due to the negligence of its own employee.

On these facts I had no hesitation in allowing the defendant's appeal and setting aside the judgment of the lower court, in allowing the plaintiff s claim in respect only on the interest sum.

In respect of the defendant's counter-claim that was dismissed, Mr. Cheah for the plaintiff only relied on the fact that the counter-claim was not pleaded with sufficient detail. I do not agree. Whilst the defence and counter-claim as pleaded cannot be said to be a pristine piece of perfection, they contain sufficient details to sustain the counter-claim which I allowed with costs.

For purposes of calculation, I fixed the share price of the 25 lots pledged to be calculated at the rate of RM10.30 per share being the lowest price on the day the shares were pledged.